



Public Defense Services Commission ♦ Office of Public Defense Services
1175 Court St.NE ♦ Salem, OR97301 ♦ www.oregon.gov/opds ♦ Phone: 503-378-3349 ♦ Fax: 503-378-4463

Public Defense Services Commission

Office of Public Defense Services

Executive Director's Biennial Report to the
Oregon Legislative Assembly
July 1, 2015 – June 30, 2017

Nancy Cozine
Executive Director
(December 2017)

Contents

I. INTRODUCTION	3
(A) AGENCY MISSION	3
(B) THE RIGHT TO COUNSEL	3
(C) ROLE IN JUVENILE AND CRIMINAL JUSTICE SYSTEMS.....	4
(D) OREGON’S PUBLIC DEFENSE DELIVERY MODEL	4
II. AGENCY ORGANIZATION AND OPERATION.....	5
III. PDSC’S ACCOMPLISHMENTS IN 2013-2015	7
(A) CONTRACT SERVICES.....	7
(B) FINANCIAL SERVICES	7
(C) QUALITY ASSURANCE	7
1. <i>Statewide Surveys</i>	8
2. <i>Complaint Program</i>	8
3. <i>Contract Revisions</i>	8
4. <i>Peer Reviews</i>	9
5. <i>Service Delivery Reviews</i>	9
6. <i>Parent Child Representation Program</i>	10
(D) DIVERSITY TRAINING	11
(E) APPELLATE DIVISION.....	11
1. <i>Criminal Appellate Section</i>	12
2. <i>Juvenile Appellate Section</i>	12
IV. PDSC’S CHALLENGES IN 2013 – 2015	14
(A) ENSURING QUALITY REPRESENTATION	14
(B) RECRUITMENT AND RETENTION	14
(C) COMPENSATION	15
(D) FUNDING FOR 2015-2017	15
V. CONCLUSION.....	16
APPENDIX A	17

The Right to Counsel

“That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, 466 US 668, 685 (1984)

I. Introduction

The Public Defense Services Commission (PDSC) is an independent commission within the judicial branch of state government. In July of 2003 it assumed full responsibility for administering Oregon’s public defense system, which delivers trial level and appellate legal services in criminal, juvenile, civil commitment, post-conviction relief, and habeas corpus cases across the state.

(a) Agency Mission

In carrying out its responsibilities, the PDSC’s mission, based upon its statutory directive,¹ is to “ensure that eligible individuals have timely access to legal services, consistent with Oregon and national standards of justice.”

(b) The Right to Counsel

The legal services provided by PDSC represent an essential component of Oregon’s public safety system. Under the United States Constitution, the Oregon Constitution, and Oregon statutes, financially eligible individuals charged with a crime, parents and children in abuse and neglect cases, and individuals facing involuntary commitment due to mental illness or intellectual disability are entitled to representation by court-appointed counsel at trial and on appeal. During the 2015-2017

¹ ORS 151.216(1)(a).

biennium, circuit and appellate courts appointed attorneys to represent clients in approximately 351,000 cases.

(c) Role in Juvenile and Criminal Justice Systems

Court appointed attorneys defend the rights of all Oregonians by asserting the constitutional and statutory protections afforded to the criminally accused, family members who are involved in juvenile dependency or delinquency proceedings, and the rights of allegedly mentally ill or intellectually disabled persons, to ensure that they are not inappropriately deprived of their liberty or fundamental rights. Indeed, the state cannot legally prosecute crime, remove children from their parents, or involuntarily commit those in need of treatment without providing mandated representation to financially eligible individuals subject to these proceedings.

Defenders also contribute directly to public safety by (1) advocating for appropriate criminal sanctions that help clients avoid future involvement in the criminal justice system; (2) finding resources for families involved in dependency cases that help them avoid or limit disruption of the family unit, lead to reunification or, when reunification is not possible, help children find permanent safe and supportive homes; and (3) assisting allegedly mentally ill and intellectually disabled persons find safe and effective alternatives to involuntary hospitalization.

On both the state and local level, defenders play a valuable role in shaping our criminal and juvenile justice systems. Defenders participate in public safety planning groups and provide critical insights to policy makers regarding effective approaches to controlling crime, protecting children, providing for the mentally ill and intellectually disabled, and facilitating the efficient operation of the courts and the public safety system as a whole. Additionally, appellate level defenders raise important issues, resulting in court opinions that clarify the law and enhance its consistent application across the state.

(d) Oregon's Public Defense Delivery Model

The PDSC provides representation in most criminal and juvenile dependency appeals directly through state employee lawyers and staff

in the Appellate Division (AD) at the Office of Public Defense Services. PDSC provides representation for all trial level cases and appellate cases not handled by the Appellate Division through contractual and hourly agreements administered by the Office of Public Defense Services.

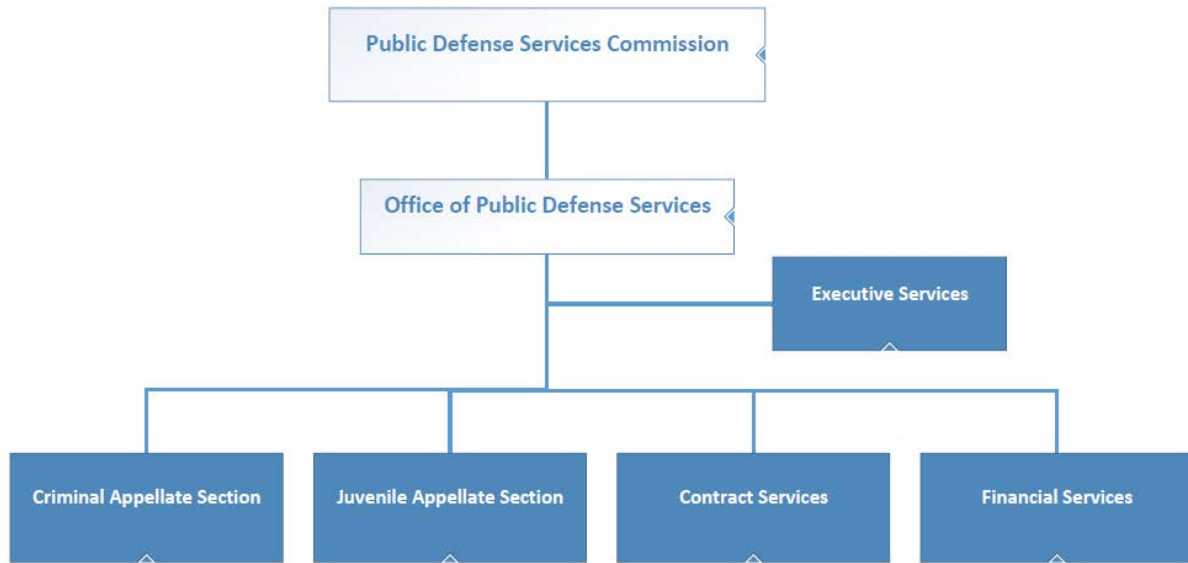
II. Agency Organization and Operation

The Public Defense Services Commission is a seven-member commission that serves as the governing body for Oregon's public defense system. It provides policy direction and oversight for administration of the system. The commissioners are civic-minded, uncompensated volunteers who are appointed by the Chief Justice, who serves as an *ex officio*, non-voting member. By statute, the Commission must include two public members (people who are not members of the Oregon State Bar), a former prosecutor, and an attorney engaged in a criminal defense practice who does not primarily serve as a court-appointed attorney compensated by the state. The current members of the PDSC are listed in Appendix A.

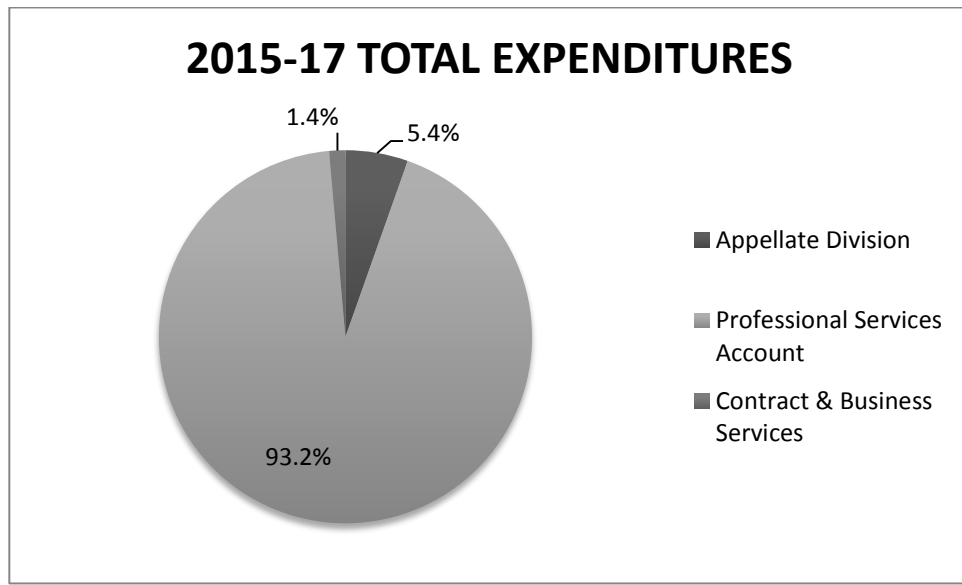
The Commission established the Office of Public Defense Services, as required by ORS 151.216(1)(b), as the administrative agency responsible for carrying out the Commission's directives and other statutorily defined duties. The Commission appoints the agency's executive director. Nancy Cozine has served as the executive director since September 7, 2011.

As shown on the Organizational Chart (next page), the Office of Public Defense Services has several work units: the Appellate Division, Contract Services, Financial Services, and Executive Services. The Appellate Division (AD) has two sections, both of which provide direct legal representation in state appellate courts. The Criminal Appellate Section provides appellate representation in criminal cases, and the Juvenile Appellate Section represents parents in juvenile dependency and termination of parental rights cases. Contract Services ensures representation in all trial level cases through contractual agreements negotiated with providers across the state, and a limited number of attorneys paid on an hourly basis. Financial Services is responsible for all budget-related functions, including processing and payment of agency expenses and contract obligations. Executive Services supports the entire agency in the areas of human resources, information technologies, and operations. Executive Services also includes the office of General Counsel, which is responsible for providing legal counsel for the entire agency and its Commission, including agency representation in

contested matters (such as appeals of agency denials of expense requests), trial-level quality assurance oversight, technical assistance for contract and hourly providers, and administration of the agency’s complaint program.



The chart below sets forth the 2015-2017 funding allocations for the two appropriations that fund the office (Appellate Division; Contract and Business Services) and for the Public Defense Services Account, which funds private contractors, hourly-rate attorneys, and other private service providers such as investigators and expert witnesses.



III. PDSC's Accomplishments in 2015-2017

(a) Contract Services

In order to secure consistent representation for individuals at the trial court level, Contract Services was able to negotiate contracts with more than 100 private providers, ranging from large public defender offices to sole practitioners, in every region of the state. Through these agreements, as well as some hourly representation, the agency funded attorneys in approximately 349,935 cases. Analysts performed monthly reconciliation of contractor data reports, comparing the information received to information available through court records, and worked with courts and contractors to ensure the smooth operation of the public defense system at the trial court level.

In addition to negotiating and administering contracts for the provision of legal services, the staff in Contract Services reviewed non-routine expense requests for investigators, expert witnesses, discovery materials provided by other parties, and other expenses necessary for the preparation and presentation of an adequate defense. The agency uses a peer-review process in public defender offices to obtain input from experienced attorneys about which expenses are truly "reasonable and necessary," as required by ORS 135.055. There were more than 40,646 such requests during the biennium.

(b) Financial Services

The Financial Services group processed over 52,504 payments during the 2015-17 biennium. Responses to OPDS's Customer Service Survey in 2014 indicated high satisfaction with the agency's helpfulness, accuracy, timeliness, knowledge and expertise. The Financial Services manager is responsible for the agency budget, and works with staff to prepare the 2017-19 biennium budget proposal for approval by the Commission, and assists with all budget discussions during the legislative session.

(c) Quality Assurance

The Office of General Counsel is responsible for monitoring and ensuring the quality of representation statewide. The mechanisms used are varied, including peer reviews, statewide surveys, a complaint program, and training sessions for public defense attorneys.

1. Statewide Surveys

In June 2017, OPDS conducted its tenth annual statewide public defense performance survey. The agency asks judges, prosecutors, Department of Human Services court workers, Citizen Review Board coordinators, juvenile department directors, and others to evaluate and comment upon the performance of public defense providers in each judicial district. Over 250 persons, including 110 judges, responded to the survey, which showed general satisfaction with public defense services. However, responses also showed overall concern with excessive caseloads. In nearly 400 narrative comments, respondents either addressed particular concerns with public defense services in their jurisdictions or complimented the quality of those services. OPDS staff was able to follow up with respondents and providers to discuss many of the survey comments and results.

2. Complaint Program

OPDS receives complaints from public defense clients and their families, prosecutors, courts, and occasionally from legislative staff responding to constituent concerns. Pursuant to the PDSC complaint policy and procedure, OPDS will investigate complaints that raise a facially reasonable concern regarding either the performance of public defense providers or the expenditure of public defense funds. OPDS is able to quickly resolve many concerns by facilitating communication between attorneys and clients. In other instances, OPDS will work with contract administrators to ensure that adequate training, supervision, and oversight protocols are in place that can address concerns about attorney performance. When appropriate, OPDS will suspend an attorney's eligibility to serve on public defense cases.

3. Contract Revisions

In preparation for release of the Request for Proposals for contracts to provide public defense services in 2018-2019, General Counsel directed a comprehensive review of the general terms applicable to most public defense services contracts. The resulting revisions, made after consultation with public defense providers, clarify PDSC requirements, in keeping with state and national performance standards, for representation of public defense clients and for the administration of public defense providers.

4. Peer Reviews

Peer reviews are an essential component of OPDS's quality assurance program. These reviews, staffed by teams of volunteer lawyers from around the state and coordinated by General Counsel, include an intensive three-day on-site investigation into the quality of services provided by individual public defense contractors. Peer review reports seek to identify especially effective practices that can be recommended to other providers, and to make recommendations for improvement when teams find concerns about performance. Peer review reports may also make recommendations to OPDS and PDSC regarding contract management in particular jurisdictions.

Depending upon the findings and recommendations of peer review reports, various follow-up actions may be required of the provider under review and OPDS. Under current practice, in most instances the PDSC will conduct a service delivery review about a year after a peer review report is finalized. The service delivery review, as described in more detail in the next section, will look at developments since the peer review report, as well as examine other needs and issues in a jurisdiction. During the 2015–2017 biennium, the agency completed peer reviews in Clackamas County and in Deschutes County (which examined the work of three separate contract providers).

5. Service Delivery Reviews

In pursuit of its mission to assure high quality, cost-effective public defense services during the biennium, PDSC completed

service delivery reviews in Washington and Clackamas Counties. The service delivery review process includes holding public meetings in various locations in the state, gathering information from judges, prosecutors, other officials and citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the Commission's management team to implement needed changes.

There are three phases in the process. The Executive Director and other agency representatives perform an initial investigation. The Commission then meets in the region to hear directly from the stakeholders in the local justice system, after which the Commission develops a service delivery plan, which is incorporated into a final report. This report serves as a blueprint for agency staff contracting with providers in the region. All of these reports appear on the agency's website.

In previous biennia, PDSC completed investigations in, and evaluations of, most of Oregon's local public defense systems.² It developed service delivery plans to improve the structure and operation of local systems, and to raise the quality of legal services in those jurisdictions. Service delivery reviews have also examined substantive areas of practice, devoting reports to representation in death penalty cases, juvenile representation, post-conviction cases, and management of drug courts.

6. Parent Child Representation Program

The Parent Child Representation Program (PCRP), aimed at improving the quality of legal representation for parents and children in juvenile dependency and termination proceedings, launched in Linn and Yamhill counties in August 2014 and expanded to Columbia County in 2016. The PCRP is modeled on a similar program in Washington State which, through repeated independent evaluation, has shown to be effective at reducing the use of foster care and expediting permanency for children. Key components of the program include caseload limits, additional

² As they are completed these plans are posted on the PDSC website: www.oregon.gov/OPDS/PDSCReports.page.

training and oversight requirements, and a multidisciplinary approach to representation.

Initial data already shows signs of improved outcomes and cost efficiencies in the counties where it has been implemented. Along with improved legal representation, the most notable observations are: a reduction in the use of foster care, an increase in family reunification, and expedited permanency.³

Recognizing these improved outcomes and cost savings, statewide expansion of the PCRCP was recommended by the Governor's Task Force on Dependency Representation.⁴ OPDS continues to seek funding and legislative support to expand this promising program.

(d) Diversity Training

OPDS continued its practice in 2017 of presenting a biennial diversity training program for its entire staff. The program this year focused on the enduring legacy of racism in Oregon and the experience of black lives in the state today, featuring presentation by an Oregon Health & Sciences University professor on the neuroscience of prejudice, and a panel of community activists.

(e) Appellate Division

The Appellate Division (AD) is comprised of the Criminal Appellate Section (CAS) and the Juvenile Appellate Section (JAS). CAS lawyers represent clients in the state appellate courts on direct appeal in criminal cases and in parole appeals. JAS lawyers represent parents in the majority of appeals in juvenile dependency and termination of parental rights cases.

Appellate Division managers continue to meet regularly with the Chief Judge of the Court of Appeals and the Solicitor General of the

³ Parent Child Representation Program Annual Report 2015-2016, http://www.oregon.gov/OPDS/docs/Reports/PCRCP_report_PDSC_Jan_2017.pdf.

⁴

http://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf

Department of Justice to advance and promote practices that improve the appellate process without prejudicing the rights of clients.

In addition, representatives from the Appellate Division, the Attorney General's office, and appellate court operations meet quarterly to address operational issues that affect system efficiencies, for example, issues concerning the quality and timeliness of transcript production, access to trial court files through the Odyssey system, eFiling, and appellate case docketing.

The division provides ongoing support to the trial level juvenile and criminal defense bar. AD lawyers sit on the executive committees of the Oregon State Bar's criminal law, juvenile law, constitutional law, and appellate law sections, as well as the executive and educational committees for the Oregon Criminal Defense Lawyers Association (OCDLA). AD lawyers regularly present at continuing legal education (CLE) seminars sponsored, for example, by the Oregon State Bar and the Oregon Criminal Defense Lawyers Association. The division's attorneys field email and telephone inquiries from the juvenile and criminal defense trial bar on a daily basis and provide briefing and memoranda to trial practitioners.

1. Criminal Appellate Section

During the 2015-17 biennium the criminal section continued to pursue advancement toward the PDSC's appellate Key Performance Measure, which is the median time to filing of the opening brief in criminal cases. The target is now 180 days. In 2006 the median number of days to file the opening brief was 328. The average for this biennium was about 225 days, but during the second quarter of 2015 it was down to 209 days. By the end of the biennium, average days had increased to 222. The agency expects that newer attorneys who are gaining experience are also becoming more efficient, and that the agency will be able to achieve the goal of 180 days to filing of the opening brief.

The criminal section also maintained a rigorous practice before the Oregon Supreme Court during which that caseload increased more than 25% over last biennium. The court issued written opinions in 44 cases in which CAS participated. Notable successes

in the Oregon Supreme Court include several decisions governing the lawful bounds of police-citizen interactions, cementing the reasonable suspicion standard to stop an individual to investigate criminal activity, and outlining the scope of the consent exception to the warrant requirement. Other decisions affirmed pretrial rulings suppressing illegally obtained evidence and addressed consideration of intellectual disability when imposing mandatory minimum sentences. Perhaps most notably, the Oregon Supreme Court remanded three cases where the trial court committed reversible error, imposed a constitutionally disproportionate sentence, or relied on a non-qualifying, out-of-state predicate offense.

2. Juvenile Appellate Section

In addition to a robust practice before the Oregon Court of Appeals and Supreme Court, JAS lawyers contributed to several juvenile law improvement efforts. They participated in the drafting of the Oregon State Bar's performance standards for juvenile dependency practitioners, served on the executive committees of the Juvenile Law and Appellate Practice Sections of the Oregon State Bar, served as Chair and members of the Oregon Criminal Defense Lawyers Association Juvenile Law Committee, routinely presented at CLE seminars concerning juvenile dependency law, and edited the latest draft of the Oregon State Bar Juvenile Law Bar Book. In addition, JAS lawyers devote significant time each day to assisting trial-level practitioners, resulting in numerous trial wins for families and obviating the need for appeal.

JAS litigation has resulted in a body of case law effectuating the legislature's preference for family unity, autonomy, and reunification. Most notably, the Oregon Supreme Court has clarified that the proponent of changing a child's permanency plan to anything other than reunification bears the burden of proving as threshold elements that the department's reunification efforts have been reasonable, and that despite those efforts, the parent's progress has been insufficient. The Oregon Supreme Court also held that parents are entitled to effective assistance of trial counsel in dependency cases, and that parents are entitled to

vindicate that right through direct appeal or post-judgment litigation at the trial court level (depending upon the nature of the claim). Additionally, during the 2015-17 biennium, the Court of Appeals issued 66 written opinions in cases litigated by the JAS lawyers. Noteworthy holdings of the Court of Appeals include that the Department of Human Services has no entitlement to due process, that the petitioner in a termination of parental rights case must affirmatively prove that adoption is in the particular child's best interests, and that, unless and until the juvenile court terminates a parents parental rights, the parent has standing to move the juvenile court to terminate its wardship over the parent's child and dismiss the case.

IV. PDSC's Challenges in 2015 - 2017

(a) Ensuring Quality Representation

The PDSC's launch of the Parent and Child Representation Program in 2014 was a significant undertaking and a wonderful addition to the agency's existing quality assurance efforts. The enhanced training, monitoring, and compensation, in addition to reduced caseloads, have resulted in better representation for children and families in the pilot counties. Additionally, the data-driven monitoring of attorney performance is an enhancement to the agency's quality assurance efforts. As the agency develops its capacity for data storage, data analysis, and attorney evaluation through the pilot program, the lessons learned will be useful for development of such measures in other case types.

(b) Recruitment and Retention

Public defense providers at the trial court level continue to experience difficulties attracting and retaining qualified lawyers. Over the course of the biennium, several lawyers presented information to the PDSC and the Legislature regarding public defender compensation. Practitioners explained that it is difficult to attract and keep younger lawyers, most of whom have very high law school debt, due to the low rates paid for public defense cases, and that contract rates are not keeping pace with the rising costs of running a business.

(c) Compensation

The PDSC has advocated for increased compensation for Oregon's public defense lawyers each biennium in an effort to reduce caseloads and improve the quality of representation. Studies indicate that reduced caseloads improve representation and case outcomes in criminal⁵ and juvenile dependency⁶ cases, but are possible only when case rates are increased to amounts that allow attorneys to handle fewer cases. Without continued improvements in case rates, the agency will struggle to ensure reasonable attorney caseloads.

(d) Funding for 2017-2019

The PDSC submitted five substantive policy option packages (POPs) in the 2015-17 agency request budget. These packages were developed based on information received during the agency's strategic planning effort, which was launched in October 2015 and completed in October 2016. Each policy option package is summarized below.

POP 100: Expansion of the Parent Child Representation Program

POP 101: Public Defense Contractor Pay Parity

POP 102: Statewide Case Management System

POP 103: OPDS Employee Compensation Parity

POP 104: PCRPs Staffing & Quality Assurance

POP 105: Professional Services Account Budget Shortfall

The agency received funding for policy option package 105, which provided an adjustment to address an on-going shortage in funding for trial-level services. This was a critical and appreciated adjustment. Unfortunately, cuts applied in order to balance the statewide general fund eliminated funding that could have been used to provide case rate increases. This resulted in cuts for trial providers, who had to absorb rising cost within a fixed budget, or in increased caseloads in order to cover the additional costs.

⁵ Luchansky, PhD. "*The Public Defense Pilot Projects, Washington State Office of Public Defense*" (March 2009). Available electronically at:
<http://digitalarchives.wa.gov/WA.Media/do/0C9435A31893A6A3C504FA4AA28678A5.pdf>

⁶ Mark E. Courtney, PhD., Jennifer L. Hook, PhD., and Matt Orme, "*Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*," Partners For Our Children at the University of Washington, Discussion Paper Volume I, Issue I (February 2011). This report is available electronically at:
<http://partnersforourchildren.org/pocweb/userfiles/PRP%20Discussion%20Paper.pdf>

V. Conclusion

Oregon's public defense system has long been considered a national leader in the provision of effective, cost-efficient representation to qualified individuals. The Legislature's support of the agency's efforts to develop data-driven performance reviews, combined with other quality assurance efforts, and continued examination, and possibly changes to, the public defense funding model, will allow Oregon to remain a model state. Throughout the course of the 2017-19 biennium, the agency will continue to build support for adequate funding in the 2019 legislative session.

Appendix A

Oregon Public Defense Services Commission Members

Chief Justice Thomas A. Balmer
Ex-Officio Permanent Member

Per Ramfjord, Chair
Partner, Stoel Rives LLC

John R. Potter, Vice-Chair
Executive Director, Oregon Criminal Defense Lawyers Association

Thomas M. Christ
Partner, Cosgrave, Vergeer, Kester LLP

Michael De Muniz
De Muniz Law

Henry H. Lazenby, Jr.
Lazenby & Associates

Janet C. Stevens
Co-Editor, Bend Bulletin

Hon. Elizabeth Welch
Senior Judge